

**STRATEGY
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TEACHING THE JAG ELEPHANT TO DANCE...AGAIN

BY

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ABSTRACT

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The Judge Advocate General's Corps (JAGC) is a special services branch of the Army. The mission of the JAGC is to provide professional legal support and services at all echelons of command throughout the range of military operations. The JAGC must move beyond legal services and support for the Army to become the nation's premier legal organization supporting the armed forces and national defense.

The challenges of the future include reduced compliance with the law of armed conflict by adversaries of the United States, increasing the likelihood of unlawful and asymmetric attacks; overemphasis by the United States on restraint and risk avoidance, breeding timidity, tentativeness, and military ineffectiveness; efforts to civilianize the armed forces, including removal of commanders from the military justice process; and attempts to reduce the professional jurisdiction of the JAGC through pressure to consolidate, civilianize, and contract legal functions.

The myriad challenges of the future will force the JAGC to change in order to maintain its vitality and relevancy. The "transformed JAGC" must serve and support a full-spectrum defense structure that can win wars and influence peace. It must become joint and interagency compatible; non-redundant, seamless, and essential; multi-functional; integrated in doctrine and structure; an institution of values and vision that fosters quality of practice and quality of life; and a non-lethal element of military power.

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PREFACE

This paper is dedicated to the many junior members of the JAG Corps, including five Judge Advocate Captains of the 101st Airborne Division (Air Assault), deployed in harm's way in support of the war on terrorism. They are the leaders of the transformed JAG Corps of tomorrow. To mix analogies: the JAG Corps elephant must learn to dance for those who have seen the elephant.

TEACHING THE JAG ELEPHANT TO DANCE...AGAIN

In India, where the elephant is a beast of burden, a baby elephant is tethered to a stake with a short rope attached to a metal band on one of the baby's hind legs. The young elephant quickly learns that it has a range of the short rope and no more. After the elephant is grown, at the end of a day's work a metal band is once again put on a hind leg, but the elephant is not tethered with a rope to a stake because no rope and stake can hold a grown elephant. Fascinatingly, the elephant free to go anywhere it wants will range no farther than a short rope's length because that is as far as it thinks it can go with a metal band on a hind leg.¹

In 1994, retired Brigadier General Dulaney L. O'Rourke, Jr. wrote of the need to transform The Judge Advocate General's Corps (the JAG Corps), likening the JAG Corps to an elephant that, not realizing its strength, remained tethered far short of its potential.² General O'Rourke analogized the moribund JAG Corps to an elephant that must be taught to dance if it is to retain its relevance in a changing world. The JAG Corps elephant not only learned to dance, it skipped the light fantastic through the 1990s, demonstrating its worth to the Army and the nation. It overcame complaints and investigations stemming from its internal personnel practices³ and challenges to its professional jurisdiction⁴ to emerge a guardian of the Army's honor in several high-profile disciplinary matters.⁵ The JAG Corps shone even more brightly in its operational role, building a generation of soldier-lawyers and providing critical legal support in the "new LIC" ("Legally Intensive Conflict") environment of military operations other than war that supplanted the Cold War.

As the Army moves into the new millennium toward the Objective Force and operations become increasingly combined, joint, and interagency undertakings, new challenges will again force the JAG Corps elephant to learn new dances. The challenges of this new century will not merely test the relevance of the JAG Corps elephant, but will stress its vitality and threaten its continued existence. In order to meet the challenges of change, the JAG Corps must transform from a special branch delivering legal services to the Army to the nation's premier legal organization supporting national security and the armed forces. If the JAG Corps elephant fails to master new steps, the dance party may very well be over.

This paper briefly describes the JAG Corps and the challenges it will face in the future. It documents the need for transformation⁶ of the JAG Corps. Finally, it recommends specific changes to the JAG Corps in order to make it relevant to the full-spectrum defense structure posited in The Army Vision⁷ and Joint Vision 2020.⁸

THE JAG CORPS IN BRIEF

The JAG Corps is the Army's military legal services and support structure, managing and executing the delivery of comprehensive legal services to the Army and its members. The Judge Advocate General (TJAG) is the military legal advisor to the Secretary of the Army (SA) and Chief of Staff, U.S. Army (CSA) and all officers and agencies of the Army.⁹ First authorized by General George Washington and the Second Continental Congress in 1775,¹⁰ the JAG Corps now exists by law.¹¹ Comprised of more than 3,800 officer-attorneys (1,457 in the Active Component, 2,384 in the Reserve Components), it also includes in the overarching Judge Advocate Legal Service (JALS) officers detailed to the JAG Corps, enlisted personnel, warrant officers, civilian attorneys for whom TJAG is the qualifying authority, consultants, legal technicians, and civilian employees.¹² Were it a law firm, the JALS would be the world's largest.¹³ The members of the JAG Corps have distinguished themselves in service in peacetime and combat, in garrison and in the field, and in legal and other endeavors.¹⁴

Officers of the JAG Corps are members of one of three special (as opposed to basic) branches of the Army (the others are the Chaplains Corps and the Army Medical Department, including its several Corps); the JAG Corps is among the services branches (as opposed to combat arms and combat support arms).¹⁵ Officers of the JAG Corps are exempt from some officer development and career management programs (Officer Professional Management System (OPMS) XXI, for example) and relieved of some significant requirements (joint duty experience, for example).¹⁶ Their personnel management is the responsibility of TJAG, not U.S. Total Army Personnel Command (PERSCOM). TJAG discharges this responsibility through the Personnel, Plans, and Training Office (PPTO) of the Office of The Judge Advocate General. Most importantly, Judge Advocates are selected for promotion and schooling by special branch boards instead of the boards convened for Army Competitive Category (ACC) officers.¹⁷ The Defense Officer Personnel Management Act (DOPMA) establishes promotion rates for Judge Advocates, which are identical to the rates set for ACC officers.¹⁸

The practice of law in the JAG Corps is not a "silk stocking" office practice.¹⁹ It is a multi-faceted, multi-disciplinary legal practice in support of the national security and the armed forces. Members of the JAG Corps have become an essential element in wide-ranging military operations at home and abroad. While still existing fundamentally to fight and win the nation's wars,²⁰ the military's recent utility has been in diverse political-military operations in vague, uncertain, complex, and ambiguous environments that blur the distinction between combat and non-combat, and between war and peace. From Somalia to Macedonia, Iraq to Haiti, Bosnia to

Rwanda, and Kosovo to Afghanistan, these operations present issues of enormous political, military, legal, and ethical complexity.²¹

As the Army faces new and sophisticated challenges, its JAG Corps has matured beyond a legal support and services branch to a cadre of legal advisors focused on concomitant political, military, and legal issues. The soldier-lawyers of the JAG Corps are competent in military and legal skills, cognizant of their internal and external representational functions, participants in operations, and mindful of the depth -- and limitation -- of their role.²² The JAG Corps lawfully facilitates mission accomplishment and empowers commanders, thereby enhancing the versatility of already capable units to meet diverse mission requirements. Its Judge Advocates have become masters of diverse areas of law and policy, and consummate soldiers. They serve simultaneously as judges, advocates, counselors, and ethical advisors.²³

The current mission statement of the JAG Corps is to provide professional legal support and services at all echelons of command throughout the range of military operations.²⁴ The mission statement has not remained static over the years, but has grown to accommodate the changes in law, warfare, and society that have made uniformed attorneys indispensable to military operations. The JAG Corps provides legal support and services in six core legal disciplines and operational law in three functional areas. The six core legal disciplines are administrative law, civil law (including contracts, fiscal law, and environmental law), claims, international law, legal assistance, and military justice.²⁵ The three functional areas are command and control, sustainment, and personnel service support.²⁶

With the advent of the Uniform Code of Military Justice in 1950, and particularly with the sweeping changes to the Code in the Military Justice Act of 1968, military attorneys (and military judges) became essential to the military justice process.²⁷ The last fifty years saw an explosion in the law and regulations governing the armed forces, necessitating a myriad of legal actions to comply with their provisions. In the last twenty years, the recognition of the practice of operational law, and its inclusion in Army doctrine and training, has led to reliance on Judge Advocates in the field as an essential element of command and control.²⁸

To accomplish its mission and focus the JAG Corps, TJAG has announced the following vision: "One legal team -- competent, confident, caring, and courageous -- grounded in values, committed to justice, and totally integrated into the Army."²⁹ The stated vision is appropriate for the JAG Corps of today, but not sufficiently comprehensive to address the challenges of the future. It is sufficient for a legal support organization focused on the Army, but inadequate for what must become the nation's preeminent counsel on the law pertaining to national security

and the armed forces. If the JAG Corps fails to boldly envision its new role, its counterparts in other services will do so, or worse, the role of preeminent counsel in military law, particularly including military justice and operational law, will fall by default to the General Counsels' offices and away from uniformed attorneys altogether.³⁰

THE CHALLENGES OF THE FUTURE

The challenges of the future include reduced compliance with the law of armed conflict by adversaries of the United States, increasing the likelihood of unlawful, asymmetric attacks; overemphasis by the United States on restraint and risk avoidance, breeding timidity, tentativeness, and military ineffectiveness; efforts to civilianize the armed forces, including removal of commanders from the military justice process; and attempts to reduce the professional jurisdiction of the JAGC through pressure to consolidate, civilianize, and contract legal functions.

The world is likely becoming a more, not less, dangerous place.³¹ Despite continued good intentions and historical ameliorative effort to the contrary,³² war will not disappear; it will just become more confusing. Future conflicts will be as much competitions of diverse technologies as clashes of diverse interests: unregulated weapons of mass destruction versus strictly controlled precision munitions, sticks and clubs versus directed energy weapons, individuals against nation-states, and blunt force versus information warfare.

New types of conflicts will test our current notions on the law pertaining to armed conflict, both *jus ad bellum* and *jus in bello*. Concepts of collective security and humanitarian intervention may supplant nation-state prerogative and territorial self-defense as the means and bases, respectively, of going to war.³³ In this regard, Kosovo may have offered a glimpse of the future.³⁴ Ironically, at the same time, new methods and actors in warfare will further challenge efforts to regulate the conduct of hostilities. The future portends individual access to weapons of mass destruction, the existence of increasingly nasty chemical-biological agents, and fixation on information warfare (which almost guarantees the targeting of civilian infrastructure). Absent great and creative thought, efforts of the Hague Regulations and Geneva Conventions to separate combatants from non-combatants, proscribe certain weapons, and preserve some humanity in battle may be increasingly viewed as quaint, anachronistic notions of the twentieth century.

Perhaps worse, the preoccupation with restraint and risk avoidance in military operations other than war in the 1990s may lead to timidity and tentativeness in wars of the twenty-first century. Overly restrictive rules of engagement and fire control measures in training

environments, wrongly imposed to create a “more complex” or “more equal” battlefield, have caused a generation of soldiers and leaders to inculcate two bad lessons: first, that they must fight with one hand tied behind their back and, second, that “the law and lawyers” are responsible for the unreasonable restraint. That neither conclusion is valid has not dissuaded those who believe, or profess to believe, them.³⁵

Most recently, in the war in Afghanistan, press reports attributed to senior Air Force officials, including a named Air Force Lieutenant General, complained that the Staff Judge Advocate of United States Central Command (USCENTCOM) had “repeatedly refused to permit [air] strikes,” including one believed to have targeted Taliban Leader Mullah Mohamed Omar.³⁶ The reported rationale of the Staff Judge Advocate was that the convoy of civilian vehicles believed to be carrying Omar might actually be carrying only non-combatant civilians (thus not a lawful target) and might even be a deliberate attempt to trick the United States into attacking a civilian convoy. For the Staff Judge Advocate to have raised these issues and counseled caution in bombing the convoy was, of course, perfectly proper. For others to have disagreed with the Staff Judge Advocate, and perhaps to assert different conclusions based on available intelligence, is also proper. However, to assert that the Staff Judge Advocate exercised the authority to “disapprove” the strikes demonstrates a flawed understanding of the rules of engagement, and a shocking misconception of the roles of the commander and the Staff Judge Advocate.

New types of conflicts will also stress many of our assumptions and practices concerning legal restraints on the role of the military in homeland defense. The attacks of 11 September 2001 proved the national vulnerability to asymmetric threats that had been suggested by studies and exercises.³⁷ Immediate analysis conducted after the attacks documented gaps in intelligence and information sharing between the military and civilian law enforcement agencies, and seams between military and civilian responsibilities for counter-terrorism in general. While some improvements in coordination and in allocation of responsibility are warranted, great care must be taken not to overreact to the threat of terrorism. For many reasons, the future merits a vigilant maintenance of the distinction between law enforcement and the military and a judicious balance between civil liberties and national security. The JAG Corps will have a major role in homeland defense under the rubric of domestic operational law, an area of practice in which the JAG Corps has been prescient in forecasting and resolving legal issues.³⁸

Not all challenges are external. Changes in force size, structure, and systems afford both opportunity and risk.³⁹ Just as attorneys are fair game for jokes and derision, they are easy targets for reductions and reorganization initiatives. When Secretary of Defense Donald H.

Rumsfeld announced a plan to trim the bureaucracy within the Department of Defense, he cited multiple layers of "general counsel officers" as a preeminent example of redundancy and inefficiency.⁴⁰ The drumbeat continued with the announcement by Secretary of the Army Thomas E. White of the Headquarters, Department of the Army Realignment initiative study, where he asked why the Secretary of the Army and the Chief of Staff of the Army should have their own staffs, presumably including their own lawyers.⁴¹

Well-meaning reorganization initiatives in the field also merit careful and vigilant monitoring lest they threaten the JAG Corps' significant involvement in operations, particularly as the Army increasingly relies upon technology. Simulations are not conducive to the presentation of legal issues, and the contributions of the Staff Judge Advocate section are often not quantified. Similarly, emerging communications technology will tempt force designers to relegate "non-warfighting" functions to home station, tethered to the fighting forces only through video or virtual conferencing. Accordingly, the JAG Corps must continue to aggressively state its case about the role, location, and organization of Judge Advocates in the "transformed Army."⁴² Judge Advocates are key players in operations; their continued presence in deployed units must be enshrined in doctrine, not dependent on the force of personality.

The JAG Corps will also be stressed by efforts to consolidate functions in the institutional Army. By definition, Judge Advocate positions are at least at initial risk when any proposal is made to reduce the size of headquarters or combine command functions. In December 2001, the Army announced an initiative to streamline its institutional framework by creating regional installation commands.⁴³ The commands are intended to relieve commanders of the dual responsibilities of unit and installation command. The concept would allow unit commanders to concentrate on war-fighting responsibilities while installation commanders manage the installations. In theory, regional installation commands would create efficiencies by combining various installation functions. The JAG Corps must guard against cuts to installations' Table of Distribution and Allowances (TDA)⁴⁴ and civilian positions that typically make up the installation legal offices. This is particularly important for many larger Staff Judge Advocate (SJA) offices, such as XVIII Airborne Corps and Fort Bragg and 101st Airborne Division (Air Assault) and Fort Campbell, where the Staff Judge Advocates have merged the TDA and TO&E structures to create one efficient but still over-tasked legal office.⁴⁵ The loss of local TDA and civilian positions to a regional installation command would be near catastrophic.

The JAG Corps is not immune to retention and morale problems, challenges to its professional jurisdiction,⁴⁶ and its own institutional resistance to change. From the period 1995 to 1999, the JAG Corps was losing Captains at a rate higher than the Army overall – and the

Army loss rate was unprecedented in modern times.⁴⁷ With a change in the law⁴⁸ to allow retired officers to work with executive branch federal agencies without a reduction in retired pay, the JAG Corps lost more than twice the number of Lieutenant Colonels and Colonels it had lost due to retirement in the previous year.⁴⁹

Although the JAG Corps has retained – or perhaps even enhanced -- its professional jurisdiction as compared with the bulk of civilian practitioners, the deference afforded to “the learned counselor” has eroded and will likely further erode. Threats to the current ways of doing business are many and varied. Some, such as the most recent assault on the military justice system, come virtually from within. The May 2001 report of the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice (UCMJ), chaired by former Court of Appeals for the Armed Forces Chief Judge Walter T. Cox III, effectively recommends removing commanders from the pre-trial portions of the military justice process, including selection of courts-martial panel members.⁵⁰ The Commission report concludes that the current practice of commanders as convening authorities selecting courts-martial panel members and making other pre-trial decisions is at least archaic and at most violates the due process to which military members are entitled. In so doing, the Commission adopts the reasoning of the European Court of Human Rights, which ruled that the role of commanders as convening authorities in Great Britain’s military justice process violated the human rights of soldiers tried by courts-martial.⁵¹

The myriad challenges of the future will force the JAG Corps to change in order to maintain its vitality and relevancy. Change, like the Army’s journey into the twenty-first century, is inevitable.⁵² If the JAG Corps fails to transform, it may find itself without a role in the defense establishment of the new millennium.

RECOMMENDATIONS FOR THE FUTURE

In order to remain vital and relevant to The Army Vision and Joint Vision 2020, the JAG Corps of the future must transform in accordance with a new vision. The JAG Corps of the new century must be ***the nation's premier legal organization supporting national security and the armed forces***. The “new JAG Corps” must serve and support a full-spectrum defense structure that can win wars and influence peace. It must be:

- Joint and interagency compatible;
- Non-redundant, seamless, and essential;
- Multi-functional;
- Integrated in doctrine and structure;

- An institution of values and vision that fosters quality of practice and quality of life;
- A non-lethal element of military power.⁵³

A JOINT AND INTERAGENCY COMPATIBLE JAG CORPS

The JAG Corps must be joint and interagency compatible, with Judge Advocates and legal noncommissioned officers trained and ready to deploy to any command or operational environment. Deployed legal elements will be joint, agile, and adaptable. Built upon or with existing headquarters, and staffed with modules of Judge Advocates and legal noncommissioned officers, the elements must be ready to form a combined, joint, and interagency Task Force. The JAG Corps must aggressively seek to include a legal element, even if only one experienced Judge Advocate, on the Foreign Emergency Support Team (FEST) and Domestic Emergency Support Team (DEST) as standard operating procedure.⁵⁴ Just as Judge Advocates in the field must now be as comfortable dealing with the Command Sergeant Major as the Commanding General, they must be as comfortable in a suit as in the Battle Dress Uniform.

"Jointness" is a profound phenomenon that has only marginally impacted the military legal community. Some commentators have suggested the need for a single "Joint Legal Corps" to replace the separate service JAG Corps and departments.⁵⁵ Consolidation should not occur unless and until the separate services are themselves abolished and consolidated into one joint force. Not only would a Joint Legal Corps be out of step with the individual service organizations and cultures it would be required to support, but its Judge Advocates would become interlopers within service headquarters, vitiating the bond now existing between commanders and their legal advisors. Practical problems concerning promotion, schooling, and personnel management in general of Judge Advocates, all of which are now a service responsibility, would have to be solved as well. This is one area in which the JAG Corps does not want to be in the lead.

However, the day will come when joint legal offices will be the focus of legal practice in the field. The unified command SJA offices will grow into large organizations and the Commanders in Chiefs' (CINCs') Legal Advisors will be Brigadier Generals. A glimpse of the future is offered at the United States Transportation Command (USTRANSCOM) at Scott Air Force Base, Illinois, where the Staff Judge Advocate is an Air Force Brigadier General.⁵⁶

The relative rank and significance of the services' Judge Advocates General, the CINCs' Legal Advisors, and the Legal Advisor to the Chairman, Joint Chiefs of Staff will be a major organizational issue facing the Department of Defense legal community in the next two

decades.⁵⁷ The Judge Advocate General should be elevated to the rank of Lieutenant General, on par with The Inspector General. The Chairman's Legal Advisor should be a Major General, rotated among the services. If it is not to be left behind, the JAG Corps must grow future generations of officers who are prepared by civilian and military education, tempered by joint assignments, and steeled by operational and headquarters experience to be the Staff Judge Advocates of unified commands and the Legal Advisor to the Chairman. The JAG Corps will fail to "build a bench" of capable joint officers at its future peril.

With regard to joint assignments, the JAG Corps must study the resources provided to unified command Staff Judge Advocate sections. All are uniformly under-strength for their workload, limiting their flexibility to expand meaningfully into areas like information operations and interagency coordination.

Information operations are both a boon and bane to military attorneys. Rife with issues of law, policy, and interagency coordination, information operations are a veritable growth industry for legal counsel and analysis. The joint doctrinal publication on information operations speaks to the criticality of the Staff Judge Advocate in the planning and execution of information operations, and designates the Staff Judge Advocate as a key member of the Joint Information Operations Cell.⁵⁸ However, if not watched closely, information operations "experts," particularly those working within the compartmented programs of Special Technical Operations (STO), can preempt both the traditional and emerging role of Judge Advocates by providing seemingly definitive targeting information without any competent analysis of the applicability and impact of the law of armed conflict. Non-lawyer "experts" frequently portray information operations as much more complicated and constrained by "legal issues" than they would be if analyzed in a traditional law of armed conflict proportionality context.⁵⁹

Interagency coordination, particularly with "legal intensive" agencies like the Departments of Justice and State and the Federal Bureau of Investigation, is also a great opportunity for Judge Advocates. However, action officers who are not Judge Advocates frequently coordinate directly with lawyers from other agencies. This is often the case because the Staff Judge Advocate section is spread too thin to furnish officers to accomplish a liaison or coordination requirement. Not only does this deny the command the most qualified interagency interface, it deprives it of an advocate who can aggressively make its case to interagency counterparts who are members of the legal profession. Judge Advocates should be masters of vertical and horizontal interagency coordination.

A NON-REDUNDANT, SEAMLESS, AND ESSENTIAL JAG CORPS

The JAG Corps cannot be redundant to other legal structures, within and outside the Department of the Army. At the same time, the JAG Corps must maintain a broad legal competence, lest the Army be forced to out-source complex legal services. To date, the topic of legal support and services, except court reporting, has been outside the scope of both general privatization and outsourcing, and Commercial Activities, initiatives.⁶⁰ Nevertheless, installation TDA positions, particularly civilian positions, are at particular risk from such initiatives in the future and the risk will only be enhanced by the likely consolidations of Centralized Installation Management. The JAG Corps must continue to make its case that legal support to the armed forces is a function that is governmental in nature, while at the same time maximizing its positions within the MTO&E/TO&E of units.

The JAG Corps in the form of the Office of The Judge Advocate General (and the Army General Counsel's Office) had its value to the Army revaluated, albeit by omission, with the announcement on December 17, 2001 that Pentagon reorganization would not affect legal counsel. In announcing the results of the Realignment of Headquarters, Department of the Army study, with its sweeping reorganizations and consolidations, neither Secretary White nor Vice Chief of Staff, Army John M. Keane mentioned the topic of attorneys or legal functions. The executive summary of the study included no proposed changes to either the Office of The Judge Advocate General (OTJAG) or the Army General Counsel's (GC) Office.⁶¹

Perhaps the Pentagon leadership had used "lawyers" as a foil when announcing their study and never seriously intended to combine OTJAG and Army GC. More likely, the leadership had concluded upon reflection not only that legal advice is important, but that attorneys serve an important role as sounding boards and advisors to discrete facets of their clientele in matters of law and policy. Legal support to the institutional Army and headquarters is in even more demand during periods of draw-down and organizational change.

In the case of the Army, both the attorneys in OTJAG and in Army GC have the Department of the Army as their client in the professional responsibility sense.⁶² With regard to their roles and resulting confidences, however, there are subtle differences between the senior military legal advisor (TJAG) and the senior civilian legal advisor (the GC), and their respective staffs. Among other statutory and assigned duties, TJAG advises and assists the Chief of Staff, Army in formulating a candid military judgment. The GC advises and assists the Secretary of the Army in formulating departmental policy positions and strategic direction. The two formulations may not be identical, and may be very different when in their incipient stages. It would be counterproductive to the interests of both the Secretary and the Chief of Staff to have

a combined legal advisor who would be unable to provide independent advice or maintain the confidences required of trusted counsel.⁶³

The JAG Corps must be a seamless organization, with no distinction among its active and reserve component Judge Advocates and its civilian attorneys.⁶⁴ The role of the reserve component Judge Advocate is more critical than ever, particularly as the reserves assume a major role in homeland security and infrastructure protection. As members of two great professions,⁶⁵ the soldier-lawyers of the JAG Corps bring a perspective that is essential to the Army client. Although Judge Advocates have no monopoly on ethics or morality, their very presence with deployed forces represents the rule of law and demonstrates the nation's commitment to disciplined military operations and adherence to the law of armed conflict.⁶⁶

Advice on the law of armed conflict is a solemn and essential responsibility of Judge Advocates, involving as it does issues of law, regulation, policy, discipline, humanity, politics, and treaty obligations on the part of the United States. In no small measure, Judge Advocates in the field are an affirmation of the nation's intent to follow and enforce the law of armed conflict. Although the United States is not yet a party to Protocol I Additional to the Geneva Conventions of 1949, Judge Advocates provide a more comprehensive -- and immediate -- resource than contemplated by Article 82 of the Protocol (mandating legal advisors for deployed military units).⁶⁷

Discipline is central to the Army's professional identity⁶⁸ and one of the four essential elements of military culture.⁶⁹ In stability operations,⁷⁰ where restraint and legitimacy are often important to mission success, and where misconduct can have immediate worldwide impact, "doing the right thing" is essential. Discipline is also a central component of military effectiveness: "Untrained and undisciplined troops take heavy casualties; trained and disciplined ones inflict them."⁷¹ Disciplined operations are not premised on fear of prosecution under the UCMJ. Adherence to the rule of law is instilled by training and based on our national and military values.⁷²

When breaches of discipline occur, commanders and Judge Advocates must process military justice actions fairly and efficiently in accordance with law and regulation. Military justice is the primary, codal mission of the JAG Corps⁷³ and it must be accomplished flawlessly. The military of the new millennium must retain its capability to enforce discipline in the field, whether in a combat or non-combat environment. The effective enforcement of discipline includes exercising jurisdiction over members of a joint force,⁷⁴ trying courts-martial in combat zones, and preserving the current roles and duties of commanders as convening authorities.

A MULTI-FUNCTIONAL JAG CORPS

Judge Advocates must increasingly serve as multi-functional staff officers, particularly in civil-military and post-conflict operations. Judge Advocates have an obvious and traditional role in civil-military operations. Judge Advocates were involved in the nascent stages of Army civil affairs. In 1941, The Judge Advocate General (and later Provost Marshal General), Major General Allen W. Gullion, suggested the need for advanced military government training. General Gullion supervised the production of the War Department Field Manual on military government.⁷⁵ The JAG Corps was offered the military government mission, but demurred.⁷⁶ Tomorrow's Army should strongly consider giving the JAG Corps staff responsibility for the civil affairs/civil-military operations mission.

As the Army marches toward the Objective Force, the operational law role of the Judge Advocate becomes ever more critical. Smaller, more lethal forces require more capable officers, able to process and exploit information. Smaller forces need more precision and disciplined fires. Judge Advocates possess the education and experience, judgment and maturity, and mental acuity and flexibility to cope with the complexities and pace of tomorrow's operations. Their greatest asset is the mind, and they require extraordinarily little equipment or support to be fully operational. At risk of using a well-worn phrase, Judge Advocates are force multipliers, particularly within smaller deployed headquarters elements. In the 101st Airborne Division (Air Assault), two Judge Advocates serve in the division's revamped Assault Command Post, performing personnel and logistics functions as well as legal duties.⁷⁷

A JAG CORPS INTEGRATED IN DOCTRINE AND STRUCTURE

The role of the Judge Advocate will be increasingly integrated into Army and joint doctrine. The revitalization of the Center for Law and Military Operations⁷⁸ and the involvement of Judge Advocates in the Army's four Combat Training Centers are major investments in the JAG Corps and the Army of the future. Not only must the JAG Corps continue to refine its own doctrine, it must ensure that developing Army and joint doctrine reflects the role of the Judge Advocate. This process is already underway. Numerous joint and service publications contain chapters, sections, or appendices on "legal responsibilities" or "legal considerations."⁷⁹

Proactive operational law advice, and legal support and services in the field, will facilitate mission accomplishment by unburdening commanders, reducing distractions, enforcing discipline, and promoting effectiveness. Prompt and astute advice, and effective training contributions, can set the conditions for future success. Planning and executing the conflict termination and post-conflict phases of future operations will increasingly involve Judge

Advocates; they will become key advisors in mission analyses, particularly in helping define success criteria and end states. Judge Advocates will assist commanders execute disciplined operations in compliance with an evolving law of armed conflict, and provide more sophisticated advice in the areas of intelligence law, information warfare, and special operations, including civil affairs and psychological operations.

Tomorrow's Judge Advocates will continue to be at their commander's side, serving as sounding boards, trusted agents, and general counsel. Not only are they members of the commander's special and personal staff, they must be leaders within the legal section and within their unit or organization. In this regard:

The qualities of a leader are not limited to commanders. The requirements for leadership are just as essential in the staff officer, and in some respects more exacting, since he does not have that ultimate authority which can be used when necessary and must rely even more than his commander on his own strength of character, his tact, and persuasion in carrying out his duties.⁸⁰

Adequate structure must support multi-functional capability. While force, headquarters, and installation size reduction efforts merit constant vigilance to ensure the JAG Corps strength is not unduly impacted, the JAG Corps at large has been remarkably effective in demonstrating the need for reasonable end strength. During the draw-downs of the last decade, the Active Component Army shrank from 732,403 to 482,170 soldiers, a reduction of more than one-third, and from 539,417 to 221,691 civilian employees, a reduction of almost 58 percent. The JAG Corps commissioned officer active duty end-strength went from 1,731 in 1990 to 1,457 in 2000, a reduction of less than 16 percent. Total JALS attorney strength, including Active and Reserve Component Judge Advocates and civilian attorneys for whom TJAG is the qualifying authority, went from 4,872 in 1990 to 4,255 in 2000, a 12 percent reduction.⁸¹ In all, the JAG Corps saw the smallest percentage reduction in personnel strength during the draw-down of any branch in the Army.⁸²

AN INSTITUTION OF VALUES AND VISION

The JAG Corps must remain an institution of values and vision. The future requires the best people, attracted by commitment to service and retained through forward looking programs and policies that emphasize quality of life and quality of practice. The demands of a military career are many and disproportionate in their impact on families. Faced with unacceptable losses of officers, particularly Captains, the JAG Corps sought and obtained statutory relief with "Judge Advocate Continuation Pay" in 1999.⁸³ Judge Advocate Continuation Pay provides \$25,000 for Captains who have been selected for and accepted Conditional Voluntary Indefinite

career status and who agree to stay on active duty for three additional years; \$25,000 for Captains who have been selected for and accept Voluntary Indefinite career status and who agree to stay on active duty for three additional years; and \$10,000 for officers at the ten-year mark who agree to stay on active duty for an additional two years. The pay, which totals \$60,000, has been a contributing factor in significantly improving the personnel situation in 2001, with the JAG Corps actually slightly over-strength in Captains at the end of the Fiscal Year.⁸⁴ Other positive impacting factors have been a downturn in the civilian economy, renewed commitment to military service in the wake of the 11 September attacks, and increased emphasis on retention by the JAG Corps leadership, particularly including Staff Judge Advocates. The most powerful retention tool is positive and caring leadership.

As a relatively small branch managed by an internal personnel office, not by PERSCOM, and for which TJAG has personnel management authority by statute and regulation,⁸⁵ opportunities exist for long-range individual career management. Uncertainty breeds low morale.⁸⁶ At a minimum, career status officers should be able to "lock-in" follow-on assignments early in their current assignments and forecast with certainty when they will attend the Graduate Course. Subject to changes occasioned by the needs of the service, all officers projected to move in the next summer's rotation should know before Christmas where they will be assigned.

Quality of practice includes recognition by the JAG Corps of the professional desires of its officers. Some Judge Advocates want to meaningfully specialize in certain legal disciplines, while many others want to become Staff Judge Advocates. The desire to specialize seems most acute for those who want to stay in the courtroom as career prosecutors or judges. The JAG Corps has toyed with specialization in the past, and currently recognizes two areas of concentration and four skill identifiers. The areas of concentration are 55A (now 27A), Judge Advocate, and 55B (now 27B), Military Judge. The less known skill identifiers, for which very few officers have applied, are government contract law specialist (3D), patent law specialist (3F), claims/litigation specialist (3G), and international law specialist (3N).⁸⁷ The JAG Corps has also established the Acquisition Law Specialty Program, the requirements for which are less rigorous than for award of the government contract law (3D) skill identifier.⁸⁸

The Army has adopted specialization for the ACC through the OPMS XXI concept.⁸⁹ Under OPMS XXI, career officers at ten years of service apply for designation in one of four career fields: operations, operational support, institutional support, or information operations. Once selected for a career field, they compete for promotion only with their peers in the field. While OPMS XXI does not directly apply to the JAG Corps, the concept is sound. The JAG Corps should adopt a similar concept, allowing branch qualified Majors to apply for selection to

one of two broad career “tracks.” Broadly defined, the two tracks would be “legal practitioner” (the specialist track) and “legal advisor” (the generalist track). The practitioner track would be further divided into criminal litigation, civil litigation, procurement law, international law, labor and employment law, administrative and civil law, and legal assistance and tax law. Officers in the practitioner track could expect to stay within their selected legal discipline, moving through a succession of increasingly responsible action officer and supervisory assignments. Those in the advisor track would move through branch office/law center officer-in-charge (OIC), command judge advocate, senior defense counsel, and Deputy Staff Judge Advocate positions, culminating in service as Staff Judge Advocates or Regional Defense Counsel. Each track would have tailored education and training opportunities. Military judges would be selected from officers in both tracks.

Before applying for a career track, a Judge Advocate would have to be “branch qualified.” The intent of the prerequisite is to ensure that officers have had a sufficient experience base in order to make an informed decision concerning which track they wish to pursue. Branch qualification (BQ) is a requirement well known to ACC officers, but not clearly understood or followed within the JAG Corps. The BQ criteria for branches other than the three special branches are listed in Department of the Army Pamphlet 600-3, Commissioned Officer Development and Career Management.⁹⁰ Typically, the branches mandate a certain level of military education and training and successful completion of one of the specified assignments (battalion S-3, Operations Officer, for example). For the JAG Corps, BQ is not strictly defined in Department of the Army Pamphlet 600-3, but is alluded to in chapter 48 of the publication in discussions of officer characteristics, critical officer developmental assignments, assignment preferences and precedence, and duration of critical officer life cycle assignments.⁹¹ While every Judge Advocate is familiar with at least the existence of the Personnel Policy section in JAG Publication1-1, JAGC Personnel and Activity Directory and Personnel Policies,⁹² few are aware of the existence of, much less the information in, the thorough and well-written Department of the Army Pamphlet 600-3.

The JAG Corps should define BQ broadly by job description and location. This approach is consistent with the Judge Advocate Career Development Model in JAG Publication 1-1.⁹³ A Judge Advocate need not be a trial counsel, defense counsel, claims officer, legal assistance attorney, and administrative law attorney to be branch qualified. In fact, the over-ambitious rotation of young Judge Advocates may be counter-productive, leaving them insufficient time to master any position. Although there are always exceptions to the rule, two, perhaps three, jobs during a three-year field assignment will provide a sufficient experience base for a young officer.

While job tenure of twelve months is the norm, Judge Advocates should remain in trial counsel positions for eighteen months. The job of trial counsel (Brigade Legal Advisor) pertains to the core competency of military justice and time is required to garner the administrative, advisory, litigation, military, and practical expertise necessary to succeed in the position.

Officers need not be BQ until they are Majors. In order to be BQ, officers should:

- Be a graduate of the Judge Advocate Officer Graduate Course;
- Have successfully completed a supervisory or leadership position (SJA office division chief, branch office/law center OIC, senior defense counsel, or command judge advocate);
- Have successfully completed a succession of assignments at different echelons and locations, to include at least one SJA office serving an installation and one SJA section of a division or corps.

Education in general merits more comprehensive and expansive management by the JAG Corps. The JAG Corps' crown jewel is The Judge Advocate General's School, U.S. Army (TJAGSA) in Charlottesville, an American Bar Association (ABA) accredited institution that is one of two Field Operating Agencies of the Office of The Judge Advocate General. (The other is the U.S. Army Legal Services Agency, which includes the U.S. Army Claims Service.)⁹⁴ Under statutory authority,⁹⁵ TJAGSA awards a Master of Laws (LL.M.) degree for completion of the Judge Advocate Officer Graduate Course, which is the JAG Corps equivalent to the career or advanced courses of other branches. The JAG Corps should maximize the school's proximity and relation to the University of Virginia Law School and seek to have the University bestow its LL.M. degree (with emphasis in military law) on TJAGSA graduates who complete additional coursework compatible with the TJAGSA curriculum and schedule.

TJAGSA is the cornerstone for training and education of members of the JAG Corps, and the source for legal orientation for senior members of the Army. It is also the proponent of Army legal doctrine and force development, and the home of the Center for Law and Military Operations.⁹⁶ With its multiple, significant responsibilities, TJAGSA should be designated as "The Judge Advocate General's School and Center for Law and Military Operations" and authorized a Brigadier General commandant and a limited number of tenured, distinguished civilian faculty members to augment the existing military faculty. The "School and Center" concept brings the JAG Corps in line with other Army branches. Moreover, it postures TJAGSA for a future in which, because of its inherent attributes, ABA accreditation, and relationship with the University of Virginia Law School, it will emerge as the sole legal education and training institution in the Department of Defense.

Currently, TJAGSA also provides the Judge Advocate Officer Basic Course (JAOBC), among other courses. The JAOBC, which now includes a basic military and officer skills training component of four weeks duration at Fort Lee, provides entering Judge Advocates with basic military legal education. In 2000, the Army initiated the Basic Officer Leadership Course (BOLC), a branch-immaterial training course at Fort Benning designed to train all commissioned officers to established standards.⁹⁷ The Army now requires that all officers complete the BOLC. The JAG Corps is an enthusiastic supporter of the BOLC concept. New Judge Advocates who had not previously completed an Officer Basic Course began attending the BOLC in the Fall of 2001. When combined with mandatory attendance at the Army Combined Arms and Services Staff School (CAS3) at Fort Leavenworth, the BOLC should provide Judge Advocates with the basic military and leadership tools necessary to augment their professional legal education at law school and at the JAOBC.

The advanced civilian education program is a great professional schooling opportunity, and a tremendous quality of life and practice enhancer. The program affords selected officers the opportunity to obtain a government-funded LL.M. at a civilian law school in a specialized area (tax, contract law, or international law, for example) required in a subsequent utilization assignment. The JAG Corps should add "space law" as a specialized area eligible for study in anticipation of the Army's growing involvement in missile defense. Unfortunately, the program has been administered with uneven success and requires reevaluation. One year, the majority of officers most recently selected for advanced civilian education were not selected for promotion. The JAG Corps' most promising, not necessarily most studious, officers should be sent to the nation's most prestigious graduate law and doctoral programs.

Judge Advocates should be eligible for the same civilian and military education and fellowship opportunities as all officers. A step in that direction will occur in 2002, when more Judge Advocates will attend Senior Service College (SSC). The JAG Corps should send officers earlier in their careers to the SSC and to intermediate level education, such as the Command and General Staff College (CGSC) at Fort Leavenworth. This will necessitate earlier attendance at the Judge Advocate Officer Graduate Course in order to afford officers adequate time in the field between schooling assignments.

Proposals to curtail the attendance of non-combat arms officers at resident professional military schooling must be rebutted with vigor. Just as the JAG Corps is fully integrated into the operational Army, so its officers must be fully integrated within the Army's professional military education system. Both Judge Advocates and combat arms officers benefit greatly from each other's professional company at CAS3, CGSC, and SSC. The JAG Corps must also work to

dramatically increase the representation of its officers in fellowships and in assignments at locations outside the Army, such as the Central Intelligence Agency, Departments of Justice and State, Federal Bureau of Investigation, and the White House (particularly the National Security Council staff) if it is to compete in tomorrow's joint and interagency environment.

A NON-LETHAL ELEMENT OF POWER

The Corps of the future, even more than the Corps of today, will be a non-lethal element of military power. Its Judge Advocates are instruments of both engagement and disengagement, and should become the experts in conflict termination and conflict resolution. With regard to engagement, Judge Advocates are involved in Expanded International Military Education and Training,⁹⁸ and have the potential for increased participation in programs as diverse as the Marshall Center in Garmisch, Germany and the International Institute for Humanitarian Law in San Remo, Italy. As instruments of disengagement, Judge Advocates have been significant members of training teams that have prepared United Nations, multinational, or other national headquarters to successfully accept responsibility from the United States for ongoing missions.

They will have a central role in stability and support operations, in building or rehabilitating systems of governance, and in promoting security cooperation. A Judge Advocate is now serving a year in Colombia with the mission to assist in the creation of a Colombian JAG Corps, including building a JAG School.⁹⁹ They will continue to be heavily involved in international criminal tribunals, such as those established by the United Nations for the former Yugoslavia, and will likely become involved in military commissions convened for the trial of terrorists implicated in the attacks of 11 September. The JAG Corps of tomorrow may also find itself engaged (with likely great reluctance) in the new International Criminal Court established under the Rome Convention.¹⁰⁰

CONCLUSION

The great challenges of the future are great opportunities for the JAG Corps. Its members have unbridled potential for future service to the nation. By learning new steps, the JAG Corps can become a relevant, effective, and essential element of The Army Vision and Joint Vision 2020. The JAG Corps elephant can dance its way to being the nation's premier legal organization supporting national security and the armed forces.

ENDNOTES

¹ James A. Belasco, Teaching the Elephant to Dance (New York: Crown, 1990), 2.

² Dulaney L. O'Rourke, Jr., "Transformational Leadership: Teaching the JAG Elephant to Dance," 146 Military Law Review 224 (Fall 1994).

³ In 1990, the Department of Defense Inspector General investigated the personnel assignment and promotion practices of the JAG Corps. The investigation was precipitated by allegations of cronyism arising from the selection of Colonel John Bozeman for promotion to Brigadier General. As a result of the investigation, the selection board process was modified and neither Colonel Bozeman nor Colonel Tom Crean, the other Judge Advocate on the objectionable selection list who was already serving in the then Brigadier General position of Judge Advocate, U.S. Army Europe, were promoted to Brigadier General. For a description of the circumstances, see the oral history of Major General Hugh R. Overholt, produced in 2000 and on file at The Judge Advocate General's School Library, Charlottesville, Virginia.

⁴ See Kurt A. Johnson, "Military Department General Counsel as Chief Legal Officers: Impact on the Delivery of Impartial Legal Advice at Headquarters and in the Field," 139 Military Law Review 1 (Winter 1993).

⁵ Preeminent among the disciplinary matters arising in the 1990s were the Aberdeen Proving Ground drill sergeant misconduct cases, the court-martial of Sergeant Major of the Army Gene McKinney, the courts-martial arising from the murder of Private First Class Barry Winchell at Fort Campbell, Kentucky, and several high-profile cases involving senior officers. All of the matters were highly publicized and politically charged; all were disposed of in a manner that preserved the integrity of the military justice process.

⁶ The concept of "transforming" the JAG Corps, like transforming the Army, is not new. The term has been used for at least a decade to describe efforts of change. See, e.g., O'Rourke, *supra* note 2, at 224: "There are always new "in" ideas about leadership...the defining issue of the 1990s is Transformational Leadership." This paper's title is a deliberate reference to General O'Rourke's article and to the seemingly never-ending cycle of "in" ideas on leadership and transformation.

⁷ Chief of Staff, Army Eric K. Shinseki, "Intent of the Chief of Staff, Army," memorandum for all personnel, Washington, D.C., 23 March 1999; Department of the Army, U.S. Army Transformation Campaign Plan (TCP) (Washington, D.C.: U.S. Department of the Army, 10 April 2001); Department of the Army, United States Army Posture Statement 2001 (Washington, D.C.: U.S. Department of the Army, 2001).

⁸ Henry H. Shelton, Joint Vision 2020 (Washington, D.C.: U.S. Department of Defense, 2000).

⁹ TJAG serves the Secretary of the Army and members of the Secretariat "in coordination with the General Counsel." Department of the Army, Commissioned Officer Development and Career Management, Army Pamphlet 600-3 (Washington, D.C.: U.S. Department of the Army, 1 October 1998), 278; Department of the Army, Judge Advocate Legal Services, Army Regulation 27-1 (Washington, D.C.: U.S. Department of the Army, 3 February 1995, with change 1, 30 September 1996), 7.

¹⁰ Office of The Judge Advocate General, The Army Lawyer: A History of The Judge Advocate General's Corps, 1775-1975 (Washington, D.C.: Government Printing Office, 1975).

¹¹ 10 USC 3072 (2001) establishes the JAG Corps; 10 USC 3037 (2001) specifies the appointment and duties of The Judge Advocate General, the Assistant Judge Advocate General, and other general officers of the JAG Corps. The duties of JAG Corps general officers are designated at Army Regulation 27-1, *supra* note 9, at 1-5.

¹² The JALS does not include civilian attorneys within Army Materiel Command or the Corps of Engineers, civilian attorneys within the Office of the Secretary of the Army, or any attorney in the Senior Executive Service. Army Regulation 27-1, *supra* note 9, at 7.

¹³ The Judge Advocate Legal Service (JALS) has 4,255 attorneys (1,457 in the Active Component, 2,384 in the Reserve Components, and 414 civilian attorneys for whom The Judge Advocate General is the qualifying authority). The largest civilian law firm in the world is Chicago's Baker & McKenzie, with a bit over 3,000 attorneys. Baker & McKenzie, "Firm Profile," available from <<http://www.bakerinfo.com/Baker Net/Firm + Profile/default.htm>>; Internet; accessed 13 February 2002. For a listing of the 250 largest law firms, see Internet Legal Resource Guide, "National Law Journal 250;" available from <<http://www.ilrg.com>>; Internet; accessed 13 February 2002.

¹⁴ Frederic L. Borch, Judge Advocates in Combat, Army Lawyers in Military Operations from Vietnam to Haiti (Washington, D.C.: Government Printing Office, 2001), 313-327.

¹⁵ 10 USC 3064 (2000); Department of the Army, The Army Personnel Proponent System, Army Regulation 600-3 (Washington, D.C.: U.S. Department of the Army, 28 November 1997), 52-54.

¹⁶ 10 USC 619(e)(2)(C) (2000) and Army Pamphlet 600-3, *supra* note 9, at 278.

¹⁷ 10 USC 621 (2000) authorizes competitive categories for promotion of active duty officers and is implemented by Army Regulation 600-8-29. In brief, "competitive categories" are designated groups of officers who compete among themselves for promotion. The Army has designated the following groups as competitive categories: Army (the ACC, further divided by OPMS XXI into four career fields), Chaplains, JAG Corps, Medical Service Corps, Army Medical Specialist Corps, Veterinary Corps, Army Nurse Corps, Medical Corps, Dental Corps, and Warrant Officer Corps. Department of the Army, Officer Promotions, Army Regulation 600-8-29 (Washington, D.C.: U.S. Department of the Army, 30 November 1994).

¹⁸ Defense Officer Personnel Management Act, Pub. L. No. 96-513, 94 Stat. 2835 (1980).

¹⁹ "It would be well to disabuse the public mind of any superstition to the effect that the applicants under the legal branch of the Army are looking for a "snap" or "silk stocking" position far in the rear of the actual fighting. The officers acting on the staff of The Judge Advocate General are to be members of the actual fighting force, and, in the pursuit of duty, will be brought in the danger zone just as often as other specialized commissioned men, medical officers, for instance." 11 American Journal of International Law 651 (1917), quoted in Marc L. Warren, "Operational Law: A Concept Matures," 152 Military Law Review 33, 40 (Spring 1996).

²⁰ Department of the Army, The Army, Field Manual 1 (Washington, D.C.: U.S. Department of the Army, 14 June 2001).

²¹ "In the end, no strategist is stronger than his ethical foundation." Richard A. Chilcoat, "Strategic Art: The New Discipline for 21st Century Leaders" (Carlisle: Strategic Studies Institute, October 1995), 32.

²² Lawyers advise, commanders command. Nevertheless, as Sir Francis Bacon wrote, "The greatest trust between man and man is the trust of giving counsel." Gregg Herken, Counsels of War (New York, Knopf, 1985).

²³ Department of the Army, Legal Support to Operations, Field Manual 27-100 (Washington, D.C.: U.S. Department of the Army, 1 March 2000), 1-4, 1-5.

²⁴ *Ibid.*, 1-1. The current TJAG, Major General Thomas R. Romig, states the JAG Corps mission as: "Provide commanders, staffs, soldiers, and their families competent and timely legal support on the full range of issues affecting the Army and the quality of life of its people." Clyde "Butch" Tate, Colonel, U.S. Army, Chief, Personnel, Plans, and Training Office, Office of The Judge Advocate General, telephone interview by author, 28 January 2002 (hereinafter PPTO interview).

²⁵ *Ibid.*, viii; compare Army Regulation 27-1, *supra* note 9, at 7, which lists 23 legal fields.

²⁶ Field Manual 27-100, *supra* note 23, at viii.

²⁷ The Uniform Code of Military Justice (UCMJ), Pub. L. No. 81-506, 64 Stat. 108 (1950) was signed by President Truman on 8 May 1950 and took effect on 31 May 1951. The Military Justice Act of 1968, 82 Stat. 1335 (1968) and an implementing activist judiciary brought Judge Advocates into the forefront. See, e.g., John S. Cooke, "Introduction: 50th Anniversary of the UCMJ Symposium Edition," 165 Military Law Review 1 (September 2000) and George S. Prugh, Jr., "Observations on the UCMJ: 1954 and 2000," 165 Military Law Review 21 (September 2000), 25.

²⁸ See, e.g., Field Manual 27-100, *supra* note 23 and Borch, *supra* note 14.

²⁹ PPTO interview, *supra* note 24.

³⁰ The Department of Defense General Counsel is "the chief legal officer" of the Department of Defense (10 USC 140(b) (2000)). Although not without criticism (see Johnson, *supra* note 4), this approach makes sense because there is no Department of Defense TJAG and the Legal Advisor to the Chairman, Joint Chiefs of Staff has a limited function that does not include providing legal advice to the Secretary of Defense. The services are a different matter, with statutory duties in military justice prescribed for The Judge Advocates General and no corresponding "chief legal officer" statute for their General Counsel. As a matter of practical hierarchy, however, TJAG is "subordinate" to the General Counsel in the same way the Chief of Staff is subordinate to the Secretary of the Army.

³¹ See, e.g., Ralph Peters, "After the Revolution," 25 Parameters 7 (Summer 1995); Ralph Peters, "The New Warrior Class," 24 Parameters 16 (Summer 1994); Robert D. Kaplan, "The

Coming Anarchy," The Atlantic Monthly (February 1994), 44; Alvin & Heidi Toffler, War and Anti-War: Survival at the Dawn of the 21st Century (New York: Warner Books, 1993); and Samuel P. Huntington, "The Clash of Civilizations?" Foreign Affairs (Summer 1993), 22.

³² See Michael A. Howard, War and the Liberal Conscience (London: Temple Smith, 1978).

³³ Martin L. Cook, "Moral Foundations of Military Service," 30 Parameters 117 (Spring 2000), 118.

³⁴ See Wesley K. Clark, Waging Modern War: Kosovo, Bosnia, and the Future of Combat (New York: Public Affairs/Perseus Book Group, 2001).

³⁵ See, e.g., W. Hays Parks, "Deadly Force is Authorized," 127 Proceedings 32 (January 2001), 32 and the "Consequences of Compliance" vignette therein at 35. When the author participated in a Combat Training Center rotation as the Legal Advisor to a Joint Special Operations Task Force (JSOTF), the JSOTF ground forces commander was frustrated because the "JTF commander" (actually an Observer-Controller roleplayer) would not approve ROE supplemental measures authorizing aerial direct fires from AC-130 gunships in support of ground forces. After much ROE play and command conferencing, the commander of the Operations Group (COG) visited the JSOTF TOC and informed the commander that the ROE could not be changed "because the purpose of the training scenario is to have a close infantry fight – if you could employ AC-130 fires, you would have too much of an advantage."

³⁶ Thomas E. Ricks, "War Targets: The Devil's in the Delays," Washington Post, November 18, 2001, sec. 1A, p. 1.

³⁷ The United States Commission on National Security/21st Century, "New World Coming: American Security in the 21st Century, Phase I Report on the Emerging Global Security Environment for the First Quarter of the 21st Century" (Washington, D.C.: U.S. Commission on National Security/21st Century, 15 September 1999); The United States Commission on National Security/21st Century, "Seeking a National Strategy: A Concert for Preserving Security and Promoting Freedom, The Phase II Report on a U.S. National Security Strategy for the 21st Century" (Washington, D.C.: U.S. Commission on National Security/21st Century, 15 April 2000).

³⁸ See, e.g., Center for Law and Military Operations, Domestic Operational Law Handbook for Judge Advocates (Charlottesville: Center for Law and Military Operations, The Judge Advocate General's School, U.S. Army, 15 April 2001) and Thomas R. Lujan, Legal Aspects of Domestic Employment of the Army," 27 Parameters 82 (Autumn 1997).

³⁹ See, e.g., Steven Metz & James Kievit, "The Siren Song of Technology and Conflict Short of War," Special Warfare (January 1996), 2.

⁴⁰ Rowan Scarborough, "Pentagon Staff to be Trimmed by 15 Percent," The Washington Times, September 11, 2001, sec. 1A, p. 1. In the article, Secretary Rumsfeld is quoted as saying, "We have so many general counsel officers that we actually have another general counsel's office whose only job is to coordinate all those general counsel."

⁴¹ News Call, "White's Vision of the Army," Army, August 2001, 63: "[Secretary White] sees the dual staffs working for the Secretary and the Chief of Staff as redundant and wants a single staff under civilian control to work for both of them."

⁴² Spaces for Judge Advocates and legal noncommissioned officers were originally not included in the Interim Brigade Combat Team (IBCT) as a space saving measure. They were later validated and restated in the approved IBCT Modified Table of Organization of Equipment (MTO&E) "Non-Lethal Effects Cell" and now include one Judge Advocate Major and one Paralegal NCO Staff Sergeant. Department of the Army, Approved IBCT MTOE, 25 July 2001. A proposed augmenting Table of Distribution and Allowances (TDA) includes three Judge Advocates (trial counsel, legal assistance officer, and administrative law officer) and three noncommissioned officers (senior legal NCO, legal NCO, and court reporter). Department of the Army, 3d Brigade, 2d Infantry Division (Interim Brigade Combat Team) Headquarters and Headquarters Company Approved TDA, 19 March 2001.

⁴³ Secretary of the Army Thomas E. White, "Realignment of Headquarters, Department of the Army, Executive Summary and Key Messages," Washington, D.C., 17 December 2001. The initiative is under study in major commands' Centralized Installation Management (CIM) reviews. Details of CIM are by no means clear.

⁴⁴ A Table of Distribution and Allowances (TDA) is a basic authorization document that prescribes the organizational structure for a unit having a support mission for which a Table of Organization and Equipment (TO&E) does not exist and which may include civilian positions. A TDA is based on the type and level of workload associated with the organization's mission. U.S. Army War College, How The Army Runs – A Senior Leader Reference Handbook, 2001-2002 (Carlisle Barracks: U.S. Army War College, 2001), 5-35.

⁴⁵ Such combinations are the norm and within the prerogative of the commander and the SJA. At Fort Campbell, the organization for legal support and services is set by local regulation. How and why to variously organize an SJA structure is almost a lost art. Publications that discussed the topic have been long rescinded. See, e.g., Department of the Army, SJA Handbook, Army Pamphlet 27-5 (Washington, D.C.: U.S. Department of the Army, July 1963).

⁴⁶ James Burk, "Expertise, Jurisdiction, and Legitimacy of the Military Profession" in Course 1, Strategic Leadership Volume I (Carlisle: U.S. Army War College, 2001), 184.

⁴⁷ Leonard Wong, "Generations Apart: Xers and the Baby Boomers" (Carlisle Barracks: Strategic Studies Institute, October 2000).

⁴⁸ The former "double dip" compensation prohibition was codified at 5 USC 5532(b) (2000) and repealed by Act of 5 October 1999, Pub. L. No.106-65, 113 Stat. 664 (2000).

⁴⁹ The JAG Corps lost 10 Lieutenant Colonels and 7 Colonels to retirement in Fiscal Year 1999. In Fiscal Year 2000, the figures were 20 Lieutenant Colonels and 18 Colonels. The repeal of the former "double dip" compensation prohibition took effect on 1 October 1999, the beginning of Fiscal Year 2000. Many of the officers retiring in 2000 remained in federal civilian employment. PPTO interview, *supra* note 24.

⁵⁰ National Institute for Military Justice, "Report of the Commission on the 50th Anniversary of the UCMJ," May 2001; available from <<http://www.nimj.org/reports.html>>; Internet; accessed 22 January 2002. See also, Strom Thurmond National Defense Act of FY 1999, sec. 552, 112 Stat. 2033 (1998), proposing modification of the current method of selection of court-martial panel members to a random selection method.

⁵¹ Findlay v. United Kingdom, 24 European Human Rights Reporter 221 (1997).

⁵² All who will lead the Army into the next century should consider Brigadier R. G. S. Bidwell's "five fallacies:" the fallacy of miniaturism (a small good army cannot defeat a big good army); the fallacy of the magic weapon (there is no such thing); the fallacy of war as chess (wars are not won by maneuver alone); the fallacy of the bloodless operation (such is self-deception); and the fallacy of the passive enemy (possible, but neither likely nor completely predictable). Brigadier R. G. S. Bidwell, "The Five Fallacies: Some Thoughts on British Military Thinking," The Royal United Service Institution Journal (February 1967), 53.

⁵³ These six characteristics of the JAG Corps of the future are a modified version of the five suggested in 1996 in Warren, *supra* note 19, at 70.

⁵⁴ The requirement for the DEST and FEST is stated in the classified Presidential Decision Directive (PDD) 39, U.S. Policy on Counterterrorism, 21 June 1995 and PDD 62, Combating Terrorism, 22 May 1998, unclassified extracts of which are contained in the Domestic Operational Law Handbook, *supra* note 37, at 389 (PDD 39, 8 March 1996 extract) and 393 (PDD 62, 22 May 1998 extract).

⁵⁵ See, e.g., Fred E. Bryant, A Joint Legal Services Agency and a Joint Operational Law Practice: The Services Judge Advocates and Lawyers Move Toward the Next Century, Strategy Research Project (Carlisle Barracks: U.S. Army War College, 5 April 1993); Chuck Anderson, "Functional Alignment of Army Branches: A Key for Change," Military Review 102 (September-October 2001).

⁵⁶ Office of The Judge Advocate General, JAGC Personnel and Activity Directory and Personnel Policies, JAG Publication 1-1 (Washington, D.C.: Office of The Judge Advocate General, U.S. Army, 2001), 39.

⁵⁷ The Judge Advocates General are Major Generals, the Chairman's Legal Advisor is a Colonel or Navy Captain. (The "Staff Judge Advocate to the Commandant," United States Marine Corps, is a Brigadier General.)

⁵⁸ Department of Defense, Joint Doctrine for Information Operations, Joint Publication 3-13, (Washington, D.C.: U.S. Department of Defense, 9 October 1998), IV-2 – IV-6; but see Department of Defense, Joint Doctrine for Command and Control Warfare (C2W), Joint Publication 3-13.1 (Washington, D.C.: U.S. Department of Defense, 7 February 1996) which incorrectly omits the SJA as a member of the C2W cell.

⁵⁹ For a dose of common sense and a good legal analysis, see James P. Terry, "The Lawfulness of Attacking Computer Networks in Armed Conflict and Self-Defense in Periods Short of Armed Conflict: What Are the Targeting Constraints?," 169 Military Law Review 70

(September 2001). Terry is a retired Marine Colonel Judge Advocate and former Legal Advisor to the Chairman, Joint Chiefs of Staff.

⁶⁰ Office of Management and Budget (OMB), Performance of Commercial Activities, Revised Supplemental Handbook Circular A-76 (Washington, D.C.: U.S. Office of Management and Budget, March 1996); Department of the Army, Commercial Activities Program, Army Regulation 5-20 (Washington, D.C.: U.S. Department of the Army, 20 October 1986), 26; Department of the Army, Commercial Activities Study Guide, Army Pamphlet 5-20 (Washington, D.C.: U.S. Department of the Army, 31 July 1998), 93.

⁶¹ Realignment of Headquarters, Department of the Army, *supra* note 43; the Department of the Army General Counsel is authorized at 10 USC 3019 (2000) to perform such duties as the Secretary of the Army may direct.

⁶² Department of the Army, Rules of Professional Conduct for Lawyers, Army Regulation 27-26 (Washington, D.C.: U.S. Department of the Army, 1 May 1992).

⁶³ Johnson, *supra* note 4.

⁶⁴ Judge Advocates, active and reserve, and Department of the Army civilian attorneys for whom TJAG is the "qualifying authority" (not including civilian attorneys in the GC's Office) are part of the "Judge Advocate Legal Service." Army Regulation 27-1, *supra* note 9, at 7.

⁶⁵ Burk, *supra* note 46, at 204.

⁶⁶ The Army, *supra* note 20, at 1.

⁶⁷ The 1977 Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, U.N. Document A/32/144, Annex 16 I.L.M. 1391, 1125 U.N.T.S. 3.

⁶⁸ The Army, *supra* note 20, at 3.

⁶⁹ Center for Strategic and International Studies International Security Program Report, American Military Culture in the Twenty-First Century (Washington, D.C.: CSIS Press, 2000), 8.

⁷⁰ Department of the Army, Operations, Field Manual 3-0 (Washington, D.C.: U.S. Department of the Army, 14 June 2001), chapter 9.

⁷¹ Brigadier General Jack Rogers, *quoted in* Department of Defense, Special Operations in Peace and War, United States Special Operations Command Publication 1 (Washington, D.C.: U.S. Department of Defense, 25 January 1996), C-1.

⁷² The Army, *supra* note 20, at 3.

⁷³ 10 USC 806 (2000) (and the UCMJ generally). The Judge Advocate General is responsible for the overall supervision and administration of military justice within the Army. Department of the Army, Military Justice, Army Regulation 27-10 (Washington, D.C.: U.S. Department of the Army, 24 June 1996, with change 1, 20 August 1999), 1.

⁷⁴ Department of Defense, Unified Action Armed Forces (UNAAF), Joint Publication 0-2 (Washington, D.C.: U.S. Department of Defense, 10 July 2001), V-20 – V-21

⁷⁵ There were three Field Manuals 27-5 on military government. The first, dated 30 July 1940, states on its title page that it was "prepared under direction of The Judge Advocate General." War Department, Basic Field Manual of Military Government, Field Manual 27-5 (Washington, D.C.: U.S. War Department, 30 July 1940). The second and third editions were published in December 1943 and October 1947, respectively. All of the editions discuss military tribunals, including military commissions and provost courts in occupied territory and contain sample forms, including proclamations, lists of offenses and punishments, subpoenas, and charge sheets.

⁷⁶ Harry L. Coles & Albert K. Weinberg, US Army in World War II Special Studies, Civil Affairs: Soldiers Become Governors (Washington, D.C.: U.S. Department of the Army, 1964), 8-29. Ironically, the Army's School of Military Government opened at the University of Virginia, later "the home of the Army lawyer," while The Judge Advocate General's School held classes at the University of Michigan.

⁷⁷ The new modular and highly mobile ACP was fielded in 1999 and validated in the Warfighter exercise in March 2000.

⁷⁸ The Center for Law and Military Operations (CLAMO) is a resource organization for operational lawyers. Located at The Judge Advocate General's School in Charlottesville, Virginia, it was created at the direction of the Secretary of the Army in 1988. Its mission is to document and examine legal issues arising in military operations and to devise training and resource strategies for addressing those issues. Center for Law and Military Operations, "About CLAMO," available from <<http://www.jagcnet.army.mil/clamo.html>>; Internet; accessed 26 January 2002.

⁷⁹ See, e.g., Department of Defense, Doctrine for Joint Special Operations, Joint Publication 3-05 (Washington, D.C.: U.S. Department of Defense, 17 April 1998), V-5; Department of Defense, Joint Doctrine for Military Operations Other Than War, Joint Publication 3-07 (Washington, D.C.: U.S. Department of Defense, 16 June 1995), IV-8; Department of Defense, Joint Doctrine for Multinational Operations, Joint Publication 3-16 (Washington, D.C.: U.S. Department of Defense, 5 April 2000); Department of Defense, Joint Tactics, Techniques, and Procedures for Peace Operations, Joint Publication 3-07.3 (Washington, D.C.: U.S. Department of Defense, 2 February 1999); Department of Defense, Joint Doctrine for Civil-Military Operations, Joint Publication 3-57 (Washington, D.C.: U.S. Department of Defense, 8 February 2001); Department of Defense, Joint Task Force Planning Guidance and Procedures, Joint Publication 5-00.2, (Washington, D.C.: U.S. Department of Defense, 13 January 1999), II-15 (SJA), VII-5 (Joint Targeting Coordination Board, VII-6 (ROE Planning Cell)).

⁸⁰ General Matthew B. Ridgway, "Leadership," reprinted in Military Leadership: In Pursuit of Excellence 43, 51 (Robert L. Taylor & William E. Rosenbach, eds., 2d Ed. 1992), quoted in Warren, *supra* note 19, at 41.

⁸¹ Personnel figures in 1990 were 1,731 Judge Advocates on active duty and 2,860 in the Reserve Components (2,247 in the U.S. Army Reserve and 613 in the National Guard). TJAG was the qualifying authority for 340 civilian attorney positions, although only 281 were filled.

(There is almost always a shortfall in civilian attorneys because of local installation funding constraints.) PPTO interview, *supra* note 24.

⁸² Dr. Betty D. Maxfield, Headquarters, Department of the Army, G-1 Human Resources Directorate Demographic Unit, telephone interview by author, 4 March 2002.

⁸³ 37 USC 321 (2000).

⁸⁴ The JAG Corps was over-strength by one Captain at the end of Fiscal Year 2001, although the improved numbers included sixteen Captains in the Judge Advocate Officer Basic Course in Charlottesville. PPTO interview, *supra* note 24.

⁸⁵ 10 USC 806 (2000) (Article 6, UCMJ); Army Regulation 600-3, *supra* note 15, at 50.

⁸⁶ Talking about assignment uncertainty and its impact on retention, former TJAG Major General Walt Huffman remarked: "People are afraid of the dark. Leaders must turn the lights on."

⁸⁷ Department of the Army Pamphlet 600-3, *supra* note 9, at 278.

⁸⁸ JAG Publication 1-1, *supra* note 56, at 35.

⁸⁹ Department of the Army Pamphlet 600-3, *supra* note 9, at 5, 6.

⁹⁰ Department of the Army Pamphlet 600-3, *supra* note 9.

⁹¹ *Ibid.*, at 278 - 280.

⁹² JAG Publication 1-1, *supra* note 56.

⁹³ *Ibid.*, at 2-A.

⁹⁴ Army Regulation 27-1, *supra* note 9, at 3.

⁹⁵ 10 USC 4315 (2000).

⁹⁶ For a description of CLAMO, see *supra* note 78.

⁹⁷ William M. Steele & Robert P. Walters, Jr., "Training and Developing Leaders in a Transforming Army," Military Review (September-October 2001), 2-11.

⁹⁸ Jeffrey F. Addicott & Andrew M. Warner, "JAG Corps Poised for New Defense Missions: Human Rights Training in Peru," Army Lawyer (February 1991), 78.

⁹⁹ The Judge Advocate is Captain Luis Rodriguez, from the 101st Airborne Division (Air Assault).

¹⁰⁰ United Nations Diplomatic Conference of Plenipotentiary on the Establishment of an International Criminal Court (Rome Statute), opened for signature 17 July 1998.

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